

**BEFORE THE**  
**STATE OF WISCONSIN**  
**DIVISION OF HEARINGS AND APPEALS**

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In the Matter of the Revocation of a Driveway	)	
Permit (#22-2-89) Issued on 03/13/89 to	)	Case No. 94-H-889
Mrs. Marcella Dietzel	)	

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**Final Decision**

The Department of Transportation revoked a driveway access permit to United States Highways 61/151 issued to Marcella Dietzel. By letter dated October 5, 1994, Dennis Dietzel, the son of Marcella Dietzel, appealed the revocation. On November 23, 1994, the Department of Transportation issued a letter affirming the revocation. Marcella Dietzel and her sons, Dennis Dietzel and Mark Dietzel, requested a hearing before the Division of Hearings and Appeals to review the revocation. Pursuant to due notice a hearing was conducted on October 5, 1995, in Madison, Wisconsin. Mark J. Kaiser, Administrative Law Judge, presided. The respondent filed a posthearing brief on November 17, 1995, and the petitioners filed a posthearing brief on November 20, 1995.

In accordance with §§227.47 and 227.53(1)(c), Stats., the parties to this proceeding are certified as follows:

Marcella Dietzel, Dennis Dietzel, and Mark Dietzel, petitioners, by

Attorney Robert L. Sudmeier  
200 Security Building  
Dubuque, IA 52001

Wisconsin Department of Transportation, respondent, by

Attorney Frederick G. Wisner  
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The Administrative Law Judge issued a proposed decision on February 19, 1996. The Department of Transportation (Department) filed comments on the proposed decision on March 4, 1996, and the petitioners filed comments on March 5, 1996. The Department objects to the finding that revocation of the subject permit will landlock the property of Dennis Dietzel. The Department argues this finding is erroneous because under common law an easement of necessity would have been created across Marcella Deitzel's remaining land at the time of the transfer if no driveway access permit is granted. The property owned by Dennis Dietzel is landlocked. Whether under common law an easement of necessity is created across Marcella Dietzel's remaining land is beyond the scope of this hearing and no such finding will be made.

The petitioners made several objections to the proposed decision. The first objection is to the phrase "for quarry purposes only" in the caption of the case. This phrase is unnecessary for identification of the case and has been deleted from the final decision. The petitioners also argue that the proposed decision is contradictory. The basis of this argument is a sentence in the Discussion section which concludes that Dennis Dietzel's interpretation of the phrase "private driveway to rock quarry" in the permit as locational was reasonable in the context of his conversations with Department of Transportation employees. The intended conclusion was not that the interpretation was reasonable, but rather that it is understandable that Dennis Dietzel would have had such an interpretation. This portion of the Discussion section has been modified to eliminate this confusion.

Other than the modifications mentioned above and the correction of a typographical error, the proposed decision is adopted as the final decision in this matter.

#### Findings of Fact

The Administrator finds:

1. Marcella Dietzel, her late husband, Bernard Dietzel, and Lena T. Dietzel owned property in Grant County, Wisconsin a short distance south of the Village of Dickeyville. The Dietzel property abuts the west side of United States Highways 61/151 (USH 61/151). USH 61/151 is a controlled-access highway.
2. On October 23, 1958, Marcella Dietzel, Bernard Dietzel and Lena Dietzel conveyed 9.68 acres of a parcel of land with the legal description of the SW1/4-SE1/4, N1/2-SE1/4 and the S1/2-NE1/4 of Section 27, T2N, R2W, Grant County, Wisconsin to Grant County. Along with the land, the Dietzels also conveyed all access rights to USH 61/151 except for one unrestricted private driveway access and one "driveway to

be used for quarry purposes only." (Exhibit 1) The unrestricted driveway access is presently located across from County Trunk Highway HH (CTH "HH").

3. In 1989, Dennis Dietzel considered acquiring 2.748 acres of the Dietzel property for the purpose of constructing a private residence for his family. Prior to acquiring the property, Dennis Dietzel contacted the Wisconsin Department of Transportation (Department) about obtaining a driveway access from USH 61/151 for the proposed residence. On approximately March 10, 1989, Dennis Dietzel met with James Key, the Department's permit coordinator for southwestern Wisconsin. The meeting took place on the shoulder of USH 61/151 near the site of the proposed driveway.
4. At the meeting, Mr. Key indicated that a driveway permit could be issued for the site and had Dennis Dietzel sign a blank Highway Access Application. On March 13, 1989, a driveway permit was issued to Marcella Dietzel who was the property owner at the time. (Exhibit 2) On its face it carried the notation "Private Driveway to Rock Quarry." The driveway and residence were subsequently constructed. Dennis Dietzel and his family moved into the residence in February, 1990. The property was formally conveyed from Marcella Dietzel to Dennis Dietzel on March 5, 1990.
5. Mark Dietzel purchased the remainder of the Dietzel property from Marcella Dietzel by land contract executed on July 19, 1990. He also constructed a private residence on the property. He used the same driveway access to USH 61/151 as Dennis Dietzel<sup>1</sup>.
6. In 1993, the Department reconstructed USH 61/151 between the Sandy Hook interchange and Dubuque, Iowa. At the time of the reconstruction it was expanded to a multilane, divided roadway. Accommodations for Dennis Dietzel's driveway were incorporated into the plans for the reconstruction, including a crossover to the north/east bound lanes of USH 61/151. For purposes of the reconstruction, an additional .02 acre of property was acquired from the Dietzels.
7. By letters dated July 14 and September 6, 1994, the Department notified Dennis Dietzel that it was revoking the driveway access permit and ordered the removal of

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<sup>1</sup> The mouth of Mark Dietzel's driveway encroaches onto the highway right-of-way. At the hearing Mark Dietzel indicated that he is willing to reconstruct this portion of his driveway so that it joins Dennis Dietzel's driveway prior to the highway right-of-way and Dennis Dietzel indicated he would allow this reconfiguration. For purposes of this decision, it will be assumed that this will be done if necessary and the only issue is the validity of driveway permit #22-2-89 issued to Marcella Dietzel.

the subject driveway. The grounds for the revocation were that the permit was issued for a driveway to be used for rock quarry purposes only and was being used to serve a private residence. Revocation of the permit will landlock the property of Dennis Dietzel.

#### Discussion

The primary factual dispute in this matter is what Jim Key told Dennis Dietzel when they met on March 10, 1989. In his deposition, Jim Key testified that he advised Dennis Dietzel that a driveway could only be permitted at the desired location for access to a rock quarry. Dennis Dietzel testified at the hearing that Jim Key told him that a driveway for a private residence could be permitted at the site. Jim Key's testimony is based on his normal routine not on a distinct memory of the conversation. The testimony of Dennis Dietzel on this issue is found to be credible.

Regardless of what Jim Key or other employees of the Department told Dennis Dietzel a legal issue relating to the validity of the permit exists. The driveway access permit issued to Marcella Dietzel, which is at issue, indicates in the box titled "Proposed Land Use" that the subject driveway is a "Private Driveway to Rock Quarry." Dennis Dietzel testified that he construed the phrase "Private Driveway to Rock Quarry" as merely a locational description of the driveway. In the context of his conversations with Department employees, Dennis Dietzel's interpretation of this phrase is understandable.

However, the warranty deed originally conveying the property to Grant County is unambiguous. This document states "for a part of the consideration herein stated there is also bargained, sold, conveyed, and relinquished to the grantee all existing, future or potential, law or statutory easements or rights of direct access between any traveled way of the state trunk highway, designated as U.S. Highway 61 and all of the abutting real property of the grantors, whether acquired by separate conveyances or otherwise, for the following described real property abuts on the said state trunk highway."

The warranty deed contains two exceptions. The relevant exception is the second, which provides "except there is reserved the right of access to said highway from said abutting lands by means of one private driveway on the westerly side of the highway in the SW ¼ - SE ¼ of said Section 27, conforming to the regulations of the State Highway Commission. Said driveway to be used for quarry purposes only; such right to continue only so long as the driveway shall be used for the specified purposes."

Grant County acquired the access rights to this property. Pursuant to the holding in Narloch v. Department of Transportation, 115 Wis.2d 419, 240 N.W. 2d 542 (1983), the existing right of access includes the right an abutting property owner to ingress and egress,

and the right to be judged on the criteria for granting permits for access points under §86.07(2), Stats., and Chapter HY 31, Wis. Adm. Code. Clearly, the Department had the authority to summarily deny an application for a driveway access permit for a private residence at this location. The issue is whether once the Department issued a permit, it could revoke the permit. The petitioners argue that Dennis and Mark Dietzel relied on this permit in constructing their homes on this property.

Department employees performed several acts which would lead a reasonable person to believe that the Department considered the permit valid. As mentioned in the findings of fact, accommodations for the driveway were made during the reconstruction of USH 61/151 including the construction of a crossover to the northbound lanes of the highway directly across from the driveway. Additionally, at one point a Department employee requested Dennis Dietzel move a brick pillar at the mouth of his driveway which allegedly was placed on the road right-of-way.

The driveway was present throughout the reconstruction of USH 61/151. Undoubtedly, many Department employees observed the existence of the driveway. The record contains no evidence that any Department employees questioned the validity of the driveway during the reconstruction. Based on these actions and the issuance of the permit itself, it is reasonable for Dennis and Mark Dietzel to construct their homes with the assumption that they could maintain the driveway access USH 61/151.

Despite these actions on the part of the Department, the Department's revocation of the permit must be affirmed. Control of traffic is subject to the police power of the State. Creation of a controlled access highway is a proper exercise of the police power. Schneider v. State, 51 Wis. 2d 458, 187 N.W. 2d 172 (S.Ct.1971). Equitable estoppel is not available when government is exercising its police power. Department of Revenue v. Moebuis Printing, 89 Wis. 2d 610, 279 N.W. 2d 213 (1979). Dennis and Mark Dietzel may have damage claims against the Department for their losses resulting from their reliance on the actions of Department employees; however, the doctrine of equitable estoppel does not apply to this situation.

Additionally, despite the possibly misleading actions of Department employees, Dennis Dietzel should have been aware of the restricted access rights at the time the property was transferred to him from his mother. The access restrictions were clearly recorded in the warranty deed and also appear in the abstract of the property. The petitioners argue extensively that the Department must follow eminent domain procedures to close the driveway used by Dennis and Mark Dietzel. This would be true if the driveway permit issued to Marcella Dietzel in 1989 were valid for access to a private residence.

The access rights, with two exceptions, were purchased for the subject property in 1958. The Department alleges that the permit issued to Marcella Dietzel was for quarry purposes, and; therefore, within the exceptions. The driveway was not being used for quarry purposes and; therefore, should be revoked. Even assuming, as per the testimony of Dennis Dietzel, that Jim Key told him a permit for a driveway to a private residence could be issued for the proposed location, the permit was issued in error. The issuance of a permit in error does not restore access rights which had been purchased in 1958.

The testimony of the Dietzels was credible and sincere. However, the fact remains that the access rights to the Dietzel property, with the two exceptions, had been sold and Mark and Dennis Dietzel will not have access for their homes to USH 61/151 except by tying into the existing driveway across from County Trunk Highway "HH."

As a final note, there was testimony at the hearing that the Department is evaluating bypass routes for Dickeyville. Two of the three bypass routes would take USH 61/151 away from the Dietzels' driveway. It is hoped that the Department will take no action to close the Dietzel's driveway unless the highway continues past the Dietzels' driveway. If the bypass routes take the highway away from the Dietzels' driveway, presumably, the stretch of road which the driveway accesses will no longer be controlled access and the driveway may be permitted. Before the Dietzels undertake the expense of constructing new driveways which will access USH 61/151 at the permitted access point for the Dietzel property, it should be ascertained whether this expense is necessary.

#### Conclusions of Law

The Administrator concludes:

1. The access rights for the subject property were purchased along with 9.68 acres of land in 1958. The warranty deed for the transfer conveyed to Grant County 9.68 acres of land along with all access rights to USH 61/151 except for one unrestricted private driveway access and one "driveway to be used for quarry purposes only." The driveway access permit issued to Marcella Dietzel in 1989 is not valid for residential purposes.
2. Based on the actions of the Department it may have been reasonable for Dennis and Mark Dietzel to rely on the permit issued to Marcella Dietzel in constructing driveways to their private residences using the driveway access to USH 61/151 granted by permit #22-2-89. However, even if this were true, the Dietzels can not assert the doctrine of equitable estoppel as a basis for maintaining this driveway access. Creation of a controlled access highway is a proper exercise of the police

power. Equitable estoppel is not available when government is exercising its police power.

3. Pursuant to §§86.07(3) and 227.43(1)(bg), Stats., the Division of Hearings and Appeals has the authority to issue the following order.

Order

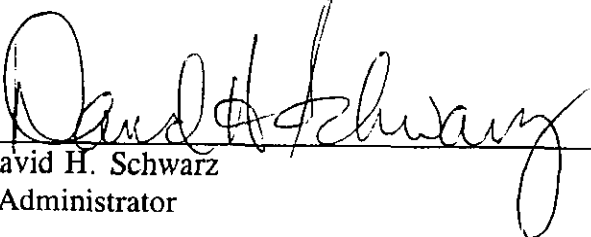
The Administrator orders:

The Department of Transportation's revocation of driveway permit #22-2-89 issued to Marcella Dietzel is affirmed.

Dated at Madison, Wisconsin on March 21, 1996.

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By

  
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David H. Schwarz  
Administrator